No. 85-446

IN THE
SUPREME COURT
OF THE
UNITED STATES

Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

_____ TERM, 1985

ROBERTS ENTERPRISES, INC.,
APPELLANT,

VS.

KANSAS SECRETARY OF TRANSPORTATION,
APPELLEE.

ON APPEAL FROM KANSAS SUPREME COURT

APPELLEE'S MOTION TO DISMISS

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No. _____

In the
SUPREME COURT
of the United States

_____

_____ Term, 1985

_____

Roberts Enterprises, Inc.,

Appellants,

vs.

Kansas Secretary of Transportation,

Appellee.

_____

On Appeal From Kansas Supreme Court

_____

APPELLEE'S MOTION TO DISMISS

The Appellee Kansas Secretary of Transportation moves to dismiss the appeal herein on the grounds that:

1. Pursuant to Supreme Court Rule 16.1(a) the appeal is not within this Court's jurisdiction;

2. Pursuant to Supreme Court Rule 16.1(a) appellant does not have standing to prosecute this appeal;

3. Pursuant to Supreme Court Rule 16.1(b) the appeal does not present a substantial federal question;

4. Pursuant to Supreme Court Rule 16.1(b) the judgment of the Supreme Court of the State of Kansas rests on an adequate non-federal basis.

The Jurisdictional Statement filed by Appellant has fully set forth the facts, Kansas statutes, opinions below, and questions presented in this case. Those matters need not be repeated here.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievances.

Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MOTION TO DISMISS

The Appellee Kansas Secretary of Transportation moves to dismiss the appeal herein on the grounds that the interpretation of the Kansas Highway Advertising Control Act of 1972 as determined by the Kansas Supreme Court is not reviewable by this Court, that Appellant lacks standing to challenge the constitutionality of the Kansas Act, that this appeal presents no substantial federal question and that the decision of the Kansas Supreme Court rests on an adequate and independent construction of a state statute.

A. This Court is Without Jurisdiction to Hear This Appeal.

The Supreme Court of the State of Kansas determined that the Kansas Highway Advertising Control Act of 1972 does not regulate noncommercial speech and noncommercial signs. Roberts Enterprises, Inc. v. Secretary of Transportation, 237 Kan. 276, 284, P.2d (1985). In this decision, the Kansas Supreme Court applied the well-recognized rule of construction which required it to uphold rather than defeat the statute if possible. The Court was bound by the rule that if there is any reasonable way to construe the statute as constitutionally valid, that construction must be adopted. Lakeside Village Improvement District v. Jefferson County, 237 Kan. 106, 697 P.2d 1286 (1985).

It was the position of the Secretary of Transportation at trial that the statutes both as written and as applied should be construed to apply only to commercial signs. In support of this position, the Secretary cited State ex rel. Department of Transportation v. Pile, 603 P.2d 337 (Okla. 1979), wherein the Oklahoma Supreme Court construed similar statutory language, under the above-mentioned rules of interpretation, to apply only to commercial speech. Such a construction was not only proper, but once made, avoided the pitfalls which doomed the San Diego ordinance in Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981).

This Court must accept the construction of the Kansas Act (K.S.A. 68-2231 et seq., as amended) as interpreted by

the Kansas Supreme Court. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980); Hortonville District v. Hortonville Ed. Assoc., 426 U.S. 482, 488, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976); Groppi v. Wisconsin, 400 U.S. 505, 574, 27 L.Ed.2d 571, 91 S.Ct. 490 (1971); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688, 3 L.Ed.2d 1512, 1516, 79 S.Ct. 1362 (1959).

Where, as here, the Kansas Supreme Court has construed the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., to apply only to commercial speech, that interpretation is completely nonreviewable by this Court.

B. Appellant Lacks Standing to Challenge the Constitutionality of the Highway Advertising Control Act.

Appellant has no personal standing to challenge the provisions of the Kansas Highway Advertising Control Act of 1972 (K.S.A. 68-2231 et seq., as amended). Roberts Enterprises, Inc. v. Secretary of Transportation, 237 Kan. 276, 283 (1985). This Court has long held that:

> [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.
>
> United States v. Raines, 362 U.S. 17, 21, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960).

Such is the established rule and the one to be followed in this case. Appellant had only commercial signs in dispute.

Appellee argued before the Kansas Court that absent standing, appellant should not be allowed to challenge the constitutionality of the Act as it

applies to noncommercial signs because appellant's constitutional rights in that area are not at issue. Appellant's only other means of obtaining standing was as a third party. Appellant sought to do this on overbreadth grounds.

Appellant claimed that there was a risk that other persons not before the Court were being deterred or prohibited by the Act from exercising constitutionally protected speech or expression. The Kansas Supreme Court expressly refused to address the issue of third party standing by stating:

> If the statute is applicable only to commercial advertising and does not apply to noncommercial speech, then we need not determine the standing issue and some of the other issues raised.
>
> 237 Kan. at 280.

While the appellee agrees with the holding of the Kansas Supreme Court, the appellee believes that the Court improperly addressed the constitutional issue in this case before determining whether appellant had third party standing.

Appellant in the case at hand fails to qualify for third party standing on overbreadth grounds. For a statute to be overbroad, this Court requires that the statute be substantially overbroad. Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). This Court stated that:

> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.

New York v. Ferber, 458 U.S. 747, 772, 73 L.Ed.2d 113, 102 S.Ct. 3388 (1982) (footnote omitted).

In the case at hand, no substantial overbreadth was ever proven. Furthermore, the Kansas Supreme Court construed the act to apply to commercial speech only. Such a construction is the type of limitation described in New York v. Ferber. There is, simply put, no third party standing available to appellant.

Because appellant lacks both personal and third party standing to challenge the constitutionality of the Kansas Highway Advertising Control Act (K.S.A. 68-2231 et seq., as amended), this appeal should be dismissed.

C. This Appeal Presents No Substantial Federal Question.

Appellant contends that the issue on appeal is whether the Kansas Supreme Court improperly held that the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., does not conflict with the First Amendment. Jurisdictional Statement, p. 2. More directly stated, appellant contends that the state statutes (K.S.A. 68-2231 et seq.) violate First Amendment rights.

In previous decisions, this Court has dismissed similar constitutional challenges to statutes regulating billboards. In Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), appeal dismissed for lack of a substantial federal question, 439 U.S. 808, 58 L.Ed.2d 101, 99 S.Ct. 66 (1978), the highest court in the State of New

York reviewed a municipal ordinance that distinguished between offsite and onsite billboard advertising, prohibiting the former and permitting the latter. The New York court sustained the validity of the ordinance, finding no regulation as to the content of the speech and ample alternate channels of communication. 43 N.Y.2d at 489. The United States Supreme Court summarily dismissed Suffolk's appeal as not presenting a substantial federal question, rejecting the submission that prohibiting offsite commercial advertising violates the First Amendment.

On several other occasions, this Court has summarily disposed of appeals from state court decisions upholding state restrictions on billboards. In both Markham Advertising Co. v. Washington, 393 U.S. 316, 21 L.Ed.2d 512,

89 S.Ct. 553 (1969), and Newman Signs, Inc. v. Hjelle, 440 U.S. 901, 59 L.Ed.2d 449, 99 S.Ct. 1205 (1979), where the validity of state statutes distinguishing between onsite and offsite commercial billboards within protected areas had been sustained, this Court dismissed the appeal for lack of a substantial federal question. Prior to Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981), this Court's most recent summary disposition of a billboard case came in Lotze v. Washington, 444 U.S. 921, 62 L.Ed.2d 177, 100 S.Ct. 257 (1979). The validity of a state statute requiring removal of billboards expressing political and social views which had been erected at locations where billboards conveying information relating to commercial use of that property would have been permitted was upheld by the

state court. This Court found no substantial question raised by the subsequent appeal.

This Court found probable jurisdiction upon the appeal of Metromedia, Inc., v. San Diego, 453 U.S. at 500. After acknowledging the summary dispositions addressed above, this court stated that:

> As we have pointed out, however, summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-181, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979); Edelman v. Jordan, supra, at 671, 39 L.Ed.2d 662, 94 S.Ct. 1347; see also Fusari v. Steinberg, 419 U.S. 379, 392, 42 L.Ed.2d 521, 95 S.Ct. 533 (1975) (Burger, C. J., concurring). They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the

> subject of previous summary action." Washington v. Yakima Indian Nation, 439 U.S. 463, 477, n 20, 58 L.Ed.2d 740, 99 S.Ct. 740 (1979); see also Tully v. Griffin, Inc.,429 U.S. 68, 74-75, 50 L.Ed.2d 227, 97 S.Ct. 219 (1976); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14, 49 L.Ed.2d 752, 96 S.Ct. 2882 (1976).
>
> 453 U.S. at 500.

A close inspection of the Court's discussion regarding the summary disposition in Suffolk provides the Court's reasoning as to why the question raised in the Metromedia appeal merited the granting of probable jurisdiction. 453 U.S. at 499.

In Metromedia, this Court noted that the definition of "billboard" in Suffolk was narrower than that in the case at hand. 453 U.S. at 499. The Suffolk definition narrowed "billboard" to: "A sign which directs attention to a

business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such sign is displayed." 453 U.S. at 499. The Metromedia definition of "billboard" swept into its scope a broad range of noncommercial speech interests. 453 U.S. at 499. This Court stated that, "Insofar as the San Diego ordinance is challenged on the ground that it prohibits noncommercial speech, the Suffolk case does not directly support the decision below [relying on Suffolk summary disposition]."

No such distinction exists in the case at hand to support disregarding the above-mentioned summary dispositions and noting probable jurisdiction on this appeal. By plain meaning of its language, the Kansas Act (K.S.A. 68-2231 et seq.) does not sweep into its definition of "billboards" broad noncommercial speech

interests. Furthermore, the Supreme Court of the State of Kansas has construed the Kansas Act as not applying to non-commercial speech interests. 237 Kan. at 284.

The above cited appeals which were dismissed for lack of a substantial federal question are to be viewed as decisions on the merits. Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 228, 95 S.Ct. 2281 (1975). The appellee submits that the appeal at hand does not represent a distinction from the previous line of cases, as did Metromedia. Just as the regulation of commercial billboards used for a variety of messages does not present a substantial federal question, as illustrated in the above-cited cases dismissed by this Court, this appeal, involving the same types of messages, does not present such a question. This appeal should be dismissed.

D. The Judgement of the Supreme Court of the State of Kansas Rests Upon an Adequate State Ground.

The Supreme Court of the State of Kansas held that:

> . . . the Kansas Highway Advertising Control Act of 1972, K.S.A. 68-2231 et seq., as amended, does not regulate noncommercial speech and noncommercial signs. Roberts does not contend that the act is unconstitutional as applied to commercial speech and advertising, and we find no constitutional infirmities in the act in that regard. As we now construe it, we hold that the act does not conflict with the First Amendment to the Constitution of the United States, and that the act is constitutional.
>
> 237 Kan. at 284.

The sole ground for holding that the Kansas Act was constitutional was the Kansas Supreme Court's construction of the state statute. The Kansas Supreme Court pointed out its opinion that

appellant does not contend that the act is unconstitutional as applied to commercial speech and advertising. The Kansas Supreme Court first decided that no regulation of noncommercial speech occurred under K.S.A. 68-2231 et seq. That Court then correctly determined that the regulation of commercial speech under K.S.A. 68-2231 et seq. does not conflict with the First Amendment to the Constitution.

Historically, this Court has not reviewed a judgment of a state court that rests on an adequate and independent ground in state law. In the case at hand, the Kansas Supreme Court interpreted state law and that interpretation decided the issue of this appeal. Further, this Court has refused to review any judgment until the fact that it does not rest on an adequate and independent ground in state law appears of record.

Accord, Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965); Herb v. Pitcairn, 324 U.S. 117, 128, 89 L.Ed. 789, 65 S.Ct. 459 (1945); Honeyman v. Hanan, 300 U.S. 14, 18-19, 81 L.Ed. 476, 57 S.Ct. 350 (1937); Fox Film Corp. v. Muller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935); Lynch v. New York ex rel. Pierson, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934); McCoy v. Shaw, 277 U.S. 302, 72 L.Ed. 891, 48 S. Ct. 519 (1928); Petrie v. Nampa and Meridian Irrigation District, 248 U.S. 154, 157, 63 L.Ed. 178, 39 S.Ct. 25 (1918); Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 163-166, 61 L.Ed. 644, 37 S.Ct. 318 (1917); Eustis v. Bolles, 150 U.S. 361 (1893); Murdock v Memphis, 20 Wall 590,

22 L.Ed. 429 (1875). Since the non-federal ground in the case at hand is adequate, this Court must decline review.

DATED this 27th day of September, 1985.

Respectfully submitted,

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Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that in accordance with U.S. Supreme Court Rule 28.3 three (3) true and correct copies of the above and foregoing Appellee's Motion to

Dismiss were deposited in the United States mail, postage prepaid, on this 27th day of September, 1985, to:

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